



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 24, 2003

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2003-2751

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179882.

The City of Waco (the "city") received a request for various information regarding a named police officer. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that Exhibits 3, 4, and 6 include medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occ. Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Accordingly, we conclude that the medical records that we have marked may be disclosed only in accordance with the access provisions of the MPA. *See* Occ. Code §§ 159.002, .004; *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted

under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, we conclude that the city must withhold these records pursuant to the MPA.

You argue that Exhibit 3 is excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 encompasses information made confidential by statute. You state that the City of Waco is a civil service city pursuant to chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the maintenance of civil service files and what may be kept in those files:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department *in accordance with this chapter*

....

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence. [Emphasis added.]

To the extent the department maintains information that subsections 143.089(b) and (c) prohibit from being placed in the civil service file, this information must be maintained in

the department's internal files, as described by section 143.089(g). *See* Attorney General Opinion JC-0257 (2000) (written reprimand is not disciplinary action under chapter 143 and must be placed in departmental file.) Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, *but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer.* The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file. [Emphasis added.]

Section 143.089(g) makes records kept in the police department's internal files confidential. *Cf. City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946. (Tex. App.—Austin 1993, writ denied) (police department files).

Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. You indicate that Exhibit 3 is contained in a personnel file that the department keeps regarding the named officer. Accordingly, we conclude that the submitted records which are maintained solely in the department's confidential internal file must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

However, we note that the submitted information that you state is maintained in the department's internal file includes evaluations of the named officer. The section 143.089(a) personnel file also must contain "any letter, memorandum, or document relating to . . . the periodic evaluation of [the officer] by a supervisor." *Id.* § 143.089(a)(3). Thus, while this information, which we have marked, may be kept in the department's internal file, it must also be kept in the civil service personnel file. Local Gov't Code § 143.089(a)(1), (3). Therefore, although the evaluations maintained in the department's internal personnel file are confidential under section 143.089(g), the evaluations in the civil service personnel file are not confidential under that provision and may not be withheld under section 552.101 of the Government Code.

Furthermore, after carefully reviewing the documents in Exhibit 4, which you indicate consists of information from the civil service personnel file, we note that some of the documents relate to internal investigations that did not result in disciplinary action as contemplated under chapter 143. As discussed above, these documents, which we have marked, must be removed from the civil service personnel file, placed in the department's internal personnel file under section 143.089(g), and withheld from disclosure under section 552.101 of the Government Code.

We note that Exhibit 4 also contains an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") that are confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Therefore, the city must withhold these marked declarations in Exhibit 4 under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

You next assert that some of the submitted information, which you have highlighted, is excepted from disclosure under section 552.117(2) of the Government Code. Section 552.117(2) excepts from release the following categories of information pertaining to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure: the officer's current and former home address and home telephone number, social security number, and information revealing whether the officer has family members. Open Records Decision No. 622 (1994). You must withhold the information that you have marked under section 552.117(2). We note that the submitted documents contain additional personal information protected under section 552.117(2) that you have not marked. We have marked this information, which you must also withhold.

Finally, you assert that certain highlighted information in Exhibit 4 is subject to section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Accordingly, you must withhold from disclosure the highlighted Texas driver's license information under section 552.130 of the Government Code. We have also marked additional information that is excepted under this section. However, we note that some of the information you have highlighted includes motor vehicle information of another state. Section 552.130 by its terms applies only to motor vehicle information issued by an agency of this state. *See* Gov't Code § 552.130. Therefore, the Oklahoma and West Virginia driver's license and license plate information is not excepted from disclosure under section 552.130.

In summary, we have marked information in Exhibits 3, 4, and 6 that may only be released in accordance with the MPA. The city must withhold the information in Exhibit 3 that is maintained solely in the police department's internal personnel file pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Evaluations contained in the departmental file must also be contained in the named officer's civil service personnel file, where they may not be withheld under section 552.101. These documents, which we have marked, must be released to the requestor. We have marked documents that must be removed from the civil service personnel file and placed in the department's internal file under section 143.089(g). These documents must be withheld under section 552.101. You must withhold the L-2 Declaration of Medical Condition and the L-3 Declaration of Psychological and Emotional Health in Exhibit 4 under section 552.101 in conjunction with section 1701.306 of the Occupations Code. You must withhold the information in Exhibit 4 that we have marked, in addition to the highlighted personal information pertaining to the officer, under section 552.117. You must also withhold the information in Exhibit 4 that we have marked, in addition to the highlighted Texas driver's license information, under section 552.130. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 179822

Enc: Submitted documents

c: Mr. Paul Flores
3800 West Waco Drive
Waco, Texas 76710
(w/o enclosures)